REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 31 OF 2018 (O.S.)

JMN.....APPLICANT

AND

PMM.....RESPONDENT

RULING

1. The Notice of Motion subject of this ruling is dated 2nd October, 2019 in which the Applicant **JMN** seeks for orders as follows: -

- Leave to amend her Originating Summons dated 11th May 2019;

- a temporary order of injunction against the Respondent **PMM,** his servants and/or agents from wasting, damaging, alienating, selling, removing or disposing of properties:

i. L.R. No. [xxxx]owned by [Particulars witheld] Investments Limited.

ii. Up country matrimonial home – Kitui.

iii. 1st Phase of [particulars withheld] Country hotel on unsurveyed Industrial Plot No. [xxxx].

iv. L.R. No. [xxxx].

2. The application was opposed on grounds that some of the properties listed were acquired before marriage, some owned by a company, thirdly the Respondent has no intentions of selling the listed property other than Runda which both agreed to dispose of.

3. The request for amendment of the Originating Summons in my view is a fair request, as a party ought not to be denied an opportunity to place his/her case before court. The same is therefore allowed.

4. Both parties allude to the fact that [Particulars withheld] Investments Limited ("the company") is owned by both of them where each has 1 share. The said company owns the matrimonial home in Runda and L.R NO 4096/R 405. It is admitted that both made substantial contributions towards purchase of the both. L.R. No. [xxxx]is said to be adjacent to 1st Phase of [particulars withheld] Country Hotel; which the Applicant claims to have contributed in developing and which plot was meant for extension of the hotel. Though the Respondent claims to have built the upcountry home solely, the Applicant claims to have contributed to its improvement.

5. Whereas in ordinary circumstances properties owned by a company ought to be dealt with under a different law regime i.e. Company Law, the situation at hand is such that the interest being claimed under Matrimonial Property Law and what would ordinarily fall under Company Law are under intertwined. This is therefore not a clear cut case for reference to a commercial court in my considered view.

6. In **PNK vs JKG (2015) eKLR** the Court of Appeal had this to say on a matter with similar issues: -

> **"… the question that we must grapple with respecting that matrimonial home is whether it is available for distribution given that it is registered in the name of the company. We are aware of some decisions of this court that seem to suggest that property registered under the name of a company can only be dealt with in accordance with the dictates of company law and do not therefore fall for determination in a family property proceedings……"**
>
> **"…. With respect, we are not ourselves persuaded that in Muthembwa vs Muthembwa was to exactly that effect quite the opposite. The court there held, and we respectfully agree, that where the property of a company had been mixed with**

matrimonial property, Section 17 allowed the court to deal with the parties' respective interest in the company as injustice might otherwise result, which, to our thinking, is a repudiation, in appropriate cases, of the sometimes unhelpful distinction between the parties as spouses as opposed to shareholders for purposes of Section 17 proceedings.

The court in Muthembwa vs Muthebwa found that Section 17 of the MWPA did, infact, allow a court to deal with the parties respective interests in a company in which they are shareholders……"

"The practical approach to Matrimonial Property that is so linked to or mixed with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to is to be more conducive to the doing of real and substantive justice unframed by the technicalities and esoteric niceties of company law that would defeat what ordinary citizens would see as rather straightforward issues of division of matrimonial property."

7. Without pre-empting the outcome of this suit I find that the situation described in the **PWK vs JKG** (supra) is similar to the matter before this court. Secondly, I find that the balance of convenience tilts in favour of the Applicant and I therefore will grant prayer 5 of the application. Prayer 6 is declined for now.

8. Costs in the cause.

SIGNED DATED and DELIVERED in open court this 23RD day of JANUARY, 2020.

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ALI-ARONI

JUDGE